IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 342 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BADRUNNISHA MOHMMAD SIKADAR

Versus

KESHIBEN JETHALAL PARMAR

Appearance:

MR MB GANDHI for Petitioner

MR SK BUKHARI for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 07/04/2000

ORAL JUDGEMENT

1. The appellant- original plaintiff,by way of this Appeal From Order, challenges the order dated 25th June 1999 below Ex. 42 in Civil Suit No. 5025 of 1998 passed by the learned City Civil Judge, Ahmedabad, allowing the

application for reviewing order Ex. 6.

2. The appellant filed the suit praying for permanent injunction restraining the respondents defendants from putting up any construction on the alleged margin land situated on the western side of the property of the appellant bearing city survey no. 31, Raikhad, Ahmedabad. In the said suit, the appellant took out Notice of Motion Ex. 5 and 6 praying for temporary injunction against the respondents. The learned Chamber Judge, by an ex-parte order dated 16th October 1998, directed the respondents to maintain status quo. As per the Commissioner's report, the respondents, on the returnable date, i.e. on 13th November 1998, submitted written statement Ex. 23 together with documentary evidence along with list Ex. 25 and prayed to vacate the interim order. On November 13,1998 itself, the appellant, vide application Ex. 21, applied for extension of interim order. It was objected by the respondents. The learned Chamber Judge, after hearing the parties, modified the previous ex-parte order and directed the respondents not to put up structure in between the passage shown in the report of the Court Commissioner. It is the case of the respondents that the respondent no.2 started construction strictly following the order of the Court and completed the construction upto the third floor. Thereafter, the aforesaid Notice of Motion was listed for hearing on 11/12th January 1999. On 11th January 1999, it appears that the matter did not reach for hearing. On 12th January 1999, at about 10.30 a.m., the advocate for the respondents was required to go to doctor for check up and treatment. He had informed his colleague to mention the matter before the Court and to request the Court for keeping back the matter for some time as he was likely to reach the Court a little late. When the matter was called out at about 11.20 a.m., he mentioned the matter before the Court. However, the Court started hearing the arguments of the appellant's advocate and passed an order without hearing the advocate for the respondents, directing the respondents to maintain status quo and to refrain from carrying on construction in between the space of 10" between the properties of survey nos. 31 and 32 making Rule absolute till the final disposal of the suit.

3. Against the said decision, the respondent no.2 preferred appeal being Appeal From Order No. 44 of 1999 before this Court. On 4th February 1999, the said Appeal From Order came up for hearing before my learned brother Y.B.Bhatt,J. and the following order was passed:-

"It is asserted by the learned Counsel for the appellant that the order below Ex. 6 which is impugned in the present appeal is an ex-parte order so far as second defendant is concerned. He also assets that when the said Notice of Motion was called out for hearing, it was mentioned to the Court that the learned Counsel for the second defendant was not well, but that he would be coming to the court after consulting his doctor. It is, therefore, asserted that the trial court, without waiting for the said counsel, proceeded to hear and decide the matter which has resulted in the impugned order. It is further contended that the construction already put up by the second defendant upto the third floor is in consonance with the earlier ad-interim order whereby he was required to keep a margin space of only four feet. Now in view of the impugned order,he is required to maintain a margin of 10 feet, which is an impossibility unless all the three floors are pulled down.

On the facts and circumstances of the case, it would appear that if these facts are presented to the trial court in a review application, the second defendant may be able to persuade the Court to review the order impugned in the present appeal. For the purpose, learned Counsel for the appellant withdraws the present appeal and the appeal is accordingly disposed of. "

4. In pursuance of the order passed by this Court, the respondent no.2 preferred review application under the chamber summons was taken out under the provisions of Order 47 Rule 1 read with section 151 of the Civil Procedure Code. As stated above, the learned Chamber Judge, City Civil Court, allowed the said application. It appears that the learned judge reviewed his own order mainly on the ground that the modified order passed below Ex. 21 was not brought to the notice of the Court at the time of hearing of Notice of Motion and since the advocate for the respondent no.2 was not present at the time of hearing,he should have drawn the attention of the Court to the modified order. The appellant has challenged the said order in this Appeal From Order.

5. Mr.M.B.Gandhi, learned Counsel appearing for the appellant has challenged the maintainability of the review application by contending that the review lies provided no appeal is preferred. In the submission of the learned Counsel, the respondent no.2, in the instant

case,had preferred an appeal and the same was not pressed and once the appeal is preferred, there is no provision which empowers the Court to review the order which is already the subject matter of appeal. To substantiate this argument, number of authorities were cited which I will refer hereafter.

6. Mr.Bukhari, learned Counsel appearing for the respondent no.2, on the other hand, justified the maintainability of the review application by contending that this Court has not decided the appeal on merits and the review application was filed pursuant to the observations made by this Court.

7. As stated above, since the advocate for the respondent no.2 was indisposed, even though a mention was made to keep back the matter for some time, the trial court heard the case in absence of the advocate for the respondent no.2 and confirmed the interim relief. The respondent no.2, in the circumstances, could have filed an application under Order 47 for setting aside the ex-parte order or Appeal From Order under Order 43 of the Civil Procedure Code, but the respondent no.2 took recourse to the remedy of filing Appeal From Order and tried to convince this Court on all available grounds. This Court could have allowed the appeal on the grounds urged, however, observed that the respondent no.2 can very well urge on these grounds before the trial court by filing review application and accordingly permitted the respondent no.2 to withdraw the Appeal From Order so that necessary application for review can be made before the trial court. Thus, there is neither any decision on merits as far as the Appeal From Order filed by the respondent no.2 is concerned nor is there any order of rejection passed by this Court. True, by preferring the appeal, the respondent no.2 waived his right of filing review application. However, since there is no decision on merits and on the contrary, with the help of the observations of this Court, the respondent no.2 by withdrawing the said appeal, filed review application. Many questions will arise for consideration, namely what would be the effect of preferring the Appeal From Order before the review application is filed; whether the Court can give any directions to the party to file review application against the provisions of Order 47 Rule 1 of the Civil Procedure Code.

8. The Calcutta High Court, in the case of Santi Kumar Jain and ors. Vs. Anil Kumar Datta, AIR 1996 Cal 4 has held that the judgment under review is appealable when the review application is not maintainable. The

appellant in the said case, sought review on the ground that the decision is erroneous on merits. The Court found that the said contention is not permissible.

9. In the case of M/s Thungabhadra Industries Ltd. Vs. Government of A.P., AIR 1964 SC 1372, the Supreme Court was required to consider the provisions of Order 47 Rule 1(1) of the Code. It was a case where the applicant filed an application for Special Leave to Appeal during the pendency of the application for review of the order of the High Court refusing to grant certificate under Article 133 of the Constitution. There was delay in filing the application for Special Leave to Appeal. The appellate court refused to condone the delay so that the petition for Special Leave to Appeal never came to be filed before the Supreme Court. The High Court rejected the application for review on the ground that the Special Leave Petition has been dismissed. The apex Court, after considering the facts and circumstances, held that in the circumstances, the refusal of the Supreme Court to entertain the application for special leave did not bar the jurisdiction of the High Court to decide the review petition nor could it be a relevant matter in deciding it. The High Court, therefore, was not justified in rejecting the application on this ground.

The facts of the said case reveal that two proceedings, namely in the High Court as well as in the apex Court were pending and the apex Court did not approve the order of the High Court not to review its own order merely on the ground that the delay in filing the application for leave to appeal was not condoned by the Supreme Court.

10. In the case of Nainsingh Vs. Koonwarjee and ors., AIR 1970 SC 997, the apex Court, considering the facts of the case, ruled that the Court cannot make use of the special provisions of section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same. Similarly, in the case of Patel Narshi Thakershi and ors. Vs. Pradyumansinghji Arjunsinghji, AIR 1970 SC 1273, while reiterating the principle, held that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. In the case of M/s Kabari Pvt. Ltd. Vs. Shivnath Shroff and ors., AIR 1996 SC 742, the apex Court, while negativing the contention of the learned Counsel for the appellant, held that the expression "from which appeal is allowed" appearing in clause (a) of Order 47 Rule 1 of the Code should be construed liberally keeping in mind

the underlying principle of Order 47 Rule 1 that before making review application, no superior court has been moved for getting the self same relief so that for the self same relief, two parallel proceedings before two forum are not taken.

Admittedly, in the said case, two proceedings, one by way of review in the High Court as well as SLP before the Supreme Court were pending and, therefore, the apex Court was required to hold accordingly.

11. In the case of Smt.Meera Bhanja Vs. Smt. Nirmala Kumari Choudhary, AIR 1995 SC 455, the apex Court held that the review court not to act as an appellate court.Giving meaning of the word "Error apparent on face of record", the apex court held that the error which strikes one on mere looking at record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions.

The aforesaid decision cited by the learned Counsel for the appellant lays down a principle regarding the maintainability of the review application, the powers of the court etc. to which there cannot be any dispute.

12. Reading the provisions of Order 47 Rule 1(a), it is clear that any person considering himself aggrieved by a decree or an order from which appeal is allowed, but from which no appeal has been preferred, and who, on the discovery of new important matter or evidence which, after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, on account of some mistake or error apparent on the face of record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for review of the judgment of the court which passed the decree or made the order. Reading this provision, it is clear that on the ground stated therein, an aggrieved party can invoke review jurisdiction, provided against the order from which appeal is allowed, but from which no appeal has been preferred. Admittedly, in the instant case, the respondent no.2 preferred an appeal challenging the order passed below Ex. 6. However, the same was withdrawn in view of the observations made by this Court to the effect that for the same contentions raised in the appeal, review application can be made. It is the contention of the learned Counsel for the appellant that as the appeal was preferred against the order passed below Ex.6, in view of Order 47 Rule 1(a), there is complete bar to the

maintainability of the application for review.

13. The learned Counsel for the appellant invited my attention to the decision of the Bombay High Court in the case of Balling Vithaling Sakharpekar Vs. Shri Devasthan Fund, Gondhale, 1931 BLR 232 wherein the Bombay High Court has held that where a party presents an application for review of judgment after he has filed an appeal from the same, the review application is incompetent though the appeal is subsequently withdrawn. In my opinion, the withdrawal of the appeal by the present respondent no.2 from this Court can be treated as if the respondent no.2 has not preferred appeal within the meaning of Order 47 Rule 1 of the Civil Procedure Code.

14. My view is fortified by the decision of Patna High Court in the case of Thakur Singh Vs. Dinanath Sah, AIR 1937 Patna 528 wherein the Patna High Court has taken a view that an appeal which has been withdrawn must be treated as if it had never been preferred within the meaning of Order 47 Rule 1 of the Civil Procedure Code. The Bombay High Court even in the case of Balling Vithaling (supra) has observed that:

> "The rule, then, is that if a litigant who has filed an appeal, wishes to apply for a review, he may do so if he first withdraws his appeal. Thus, when there is no appeal on record, he is entitled to the benefit of a fiction that none has been preferred. But that fiction is not available to the present applicant since it conflicts with the fact that an appeal was actually on record."

Since in the instant case,the respondent no.2 withdrew the appeal and thereafter filed review application, it cannot be contended that the review application is not maintainable.

15. Apart from this, after considering the submissions advanced on behalf of the respondent no.2, this Court was of the view that the very contention could have been advanced by filing the review application and accordingly, permitted the respondent no.2 to withdraw the Appeal From Order. It was contended on behalf of the appellant that this Court could not have advised the respondent no.2 to file the review application since the same is against the well settled principles of law. In my opinion, the said contention is not available to the appellant for the simple reason that it is not open for me to review the order passed by my learned brother

Y.B.Bhatt,J. The appropriate remedy for the appellant is to file an appeal against the said decision. Thus, when the respondent no.2, in pursuant to the observations made by this Court in the appeal preferred against an interim order, files a review application, pointing out that the Court has not considered its own earlier order passed below Ex. 21, since his advocate did not remain present at the time of hearing on medical ground, and a request was made to the Court to keep back the matter for some time and upon such facts, when the Court reviewed its order, I do not think that any error is committed by the Court.

16. In an identical situation, this Court decided Civil Revision Application No. 1377 of 1990 on 19th March 1994 in absence of the advocate. The concerned advocate approached the Supreme Court with the grievance that even though his appearance was filed, his name was not shown and, therefore, he prayed for setting aside the order passed in the Civil Revision Application. The Supreme Court in SLP (Civil) No. 17962 of 1995, in the case of Kandla Shipping Services Vs. Food Corporation of India, on 31st July 1995, passed the following order:-

"Delay condoned.
It is stated on behalf of the petitioner that for compelling reasons, they could not appear when the said CRA was taken up for hearing by the High Court. According to us, the petitioner should have filed an application before the High Court setting forth the details thereof before approaching this Court. This SLP is permitted to be withdrawn so that the petitioner may file an application before the High Court."

Thus, passing of such type of orders is not unusual.Therefore, this Court was justified in relegating the respondent no.2 to file review application.

The Supreme Court, in the case of S.Nagaraj & ors. Vs. State of Karnataka and anr., JT 1993(4) SC 27 has held as under:-

"Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice.

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Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order."

17. In the case of Grindlays Bank Vs. 1980 (Supplement)SCC 420, the Supreme Court considered the question as to whether the tribunal constituted under the provisions of Industrial Disputes Act has power to set aside the ex-parte order in absence of express provisions in the Act or the Rules framed thereunder or not. The Supreme Court held that the tribunal or the body should be considered to be endowed with such ancillary or incidental power as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. The Supreme Court found that there was no express provision in the Act or Rules giving power to the tribunal to set aside its ex-parte award and even then, it has been held that the tribunal should be considered as invested with such incidental or ancillary power unless there is any indication in the statute to the contrary. After examining the meaning of word "review", it has been held therein that the expression of word "review" is used in two distinct senses, namely (1) a procedural review which is either inherent or implied in a Court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. The Supreme Court further held that when a review is sought due to a procedural defect, the inadvertent error committed by the tribunal must be corrected ex debito justiciae to prevent the abuse of its process and such power inherits in every Court or Tribunal. The principle that the power to review must be conferred by statute either specially or by necessary implication is inapplicable to decisions of a Judicial Tribunal which is supposed to do complete justice to the parties before it.

18. The Division Bench of this Court, following the said decision in the case of Ram Kirpal Vs. Union of India, 1998 (3) GLR 1892, considering section 129B(2) held that the said section empowers the Customs, Excise and Gold (Control) Appellate Tribunal to reopen its order and rectify a mistake and that the same is amounting to error apparent on record.

19. The aforesaid decision is followed in the

subsequent case of Atulbhai Balabhai Patel Vs. State of Gujarat and ors., 2000(1) GLR 553 wherein this Court was required to consider the provisions of section 76 of the Bombay Tenancy and Agricultural Lands Act, 1948 which gives the tribunal the power to hear the revision application. Under the said head, there is no power to review its own. This Court has held that the power of review of a procedural nature (not substantial review) is ex debito justiciae presumed to have been conferred on every judicial authority.

In view of the aforesaid discussion, it is clear that the Court can review its own order and rectify the mistake with a view to prevent miscarriage of justice.

20. As stated above, in the instant case, the trial court having felt that while passing the order below Ex. 6, it has not taken into consideration the order below Ex.21 passed by the very court and that the concerned advocate, on sufficient ground, did not reach in time at the time of hearing, in my opinion, these are the sufficient grounds for reviewing the order and, therefore, in my opinion, no error whatsoever has been committed by the trial court in passing the impugned order.

21. The learned Counsel for the appellant has pointed out discrepancy in the impugned order whereby the learned trial judge, while allowing the review application Ex. 42 also ordered Ex. 6 to be put under review. In the submission of learned Counsel for the appellant, while allowing the application Ex. 42, the learned judge could not have passed further order reviewing the order passed below Ex. 6. In my opinion, since the respondent no.2 in the application Ex. 42 has prayed for review and recalling the order dated 12th January 1999 passed below Ex. 5 and 6 and to decide the Notice of Motion afresh after hearing the advocates for the parties, the learned judge was justified in reviewing the order passed in the Notice of Motion Ex.6.

22. Consequently, I see no merits in the present Appeal From Order and is dismissed. The learned judge will hear and decide the Ex.6 afresh in accordance with law after hearing the parties. Till then, the parties shall maintain status quo as ordered by the trial court.

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